84-133 (1)

No. 84-________

IN THE

Supreme Court of the United States

October Term, 1984

ROBERT G. HOLLIDAY,
on behalf of himself and all
other persons similarly situated,
Petitioner,

v.

XEROX CORPORATION, a New York corporation,
THE XEROX CORPORATION EMPLOYEES PROFIT SHARING
RETIREMENT PLAN, and THE XEROX CORPORATION
RETIREMENT INCOME GUARANTEE PLAN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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59 pp

STATEMENT OF QUESTION

HAS PETITIONER STATED A CLAIM UPON WHICH RELIEF CAN BE GRANTED IN ALLEGING THAT RESPONDENT XEROX VIOLATED THE FIDUCIARY REQUIREMENTS OF ERISA BY UNILATERALLY TRANSFERRING CERTAIN PRIVATE, EMPLOYEE FUNDS FROM A MORE TO A LESS EMPLOYEE-ACCESSIBLE PART OF RESPONDENT'S PROFIT SHARING RETIREMENT PLAN, CONTRARY TO THE DOCUMENTS AND INSTRUMENTS GOVERNING THAT PLAN, AND THEN USING THE TRANSFERRED FUNDS TO OFFSET THESE EMPLOYEES' RETIREMENT INCOME UNDER RESPONDENT'S RETIREMENT INCOME GUARANTEE PLAN, TO THE BENEFIT OF RESPONDENT?

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REPORTS OF OPINIONS BELOW

The District Court Opinion is reported as follows: *Holliday* v. *Xerox Corp.*, 555 F. Supp. 51 (E.D. Mich. 1982).

The Court of Appeals' Opinion is reported as follows: *Holliday* v. *Xerox Corp.*, 732 F.2d 548 (6th Cir. 1984).

STATEMENT OF JURISDICTION

Petitioner asks that this Court review by writ of certiorari, pursuant to 28 U.S.C. § 1254, the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on May 17, 1984, pursuant to that Court's opinion of April 25, 1984.

STATUTORY PROVISIONS

§ 2(a) of ERISA; 29 U.S.C. § 1001(a):

> "The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that dis-

closure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness."

§ 2(b) of ERISA; 29 U.S.C. § 1001(b):

"It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts."

§ 403(c)(1) of ERISA; 29 U.S.C. § 1103(c)(1):

"Except as provided in paragraph (2), (3), or (4) of subsection (d) of this section, or under sections 1342 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

§ 404(a)(1) of ERISA; 29 U.S.C. § 1104(a)(1):

"Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administrating the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are con-

sistent with the provisions of this subchapter or subchapter III of this chapter."

§ 406 of ERISA; 29 U.S.C. § 1106:

"(a) Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows of or should know that such transaction constitutes a direct or indirect —

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between a plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or

should know that holding such security or real property violates section 1107(a) of this title.

(b) A fiduciary with respect to a plan shall not —

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) A transfer of real property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer."

STATEMENT OF THE CASE

Procedural Background

On March 27, 1981, Petitioner filed a six-count complaint against Respondents. Count I alleges a violation of the

Employee Retirement Income Security Act of 1974 (codified at 29 U.S.C. §§ 1001 *et seq.*) ("ERISA"). Federal jurisdiction of Count I is based upon section 502 of ERISA, 29 U.S.C. § 1132. The other counts, jurisdiction of which is based on the parties' diversity of citizenship, are being litigated separately and are not at issue in this petition.

Petitioner specifically alleges in Count I on behalf of himself and all other persons similarly situated that assets of an employee benefit plan maintained by Respondent Xerox Corporation ("Xerox"), which assets were required under ERISA to be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries, have, in fact, been so handled and used by Respondent Xerox as to violate that exclusive purpose and, instead, to inure to the benefit of the employer. Petitioner contends that these actions by Respondent Xerox constitute a violation of the fiduciary requirements of ERISA.

Respondents, on February 17, 1982, moved for dismissal of Count I on the basis of failure to state a claim for which relief could be granted. On October 26, 1982, the District Court granted the motion of Respondents and dismissed Count I. On November 8, 1982, Petitioner moved for reconsideration or, alternatively, for entry of final judgment as to Count I and/or for an order allowing petition for interlocutory appeal. On December 28, 1982, the District Court denied the motion for reconsideration but entered final judgment as to Count I.

On January 4, 1983, Petitioner filed his notice of appeal in the United States Court of Appeals for the Sixth Circuit. On April 25, 1984, the Court of Appeals affirmed the District Court. It is from this decision that Petitioner seeks a writ of certiorari.

Factual Background[1]

In 1962, Respondent Xerox acquired University Microfilms, Inc. ("UMI"). Petitioner worked for UMI prior to its acquisition by Xerox and continued to be an employee of the UMI division of Xerox and later another Xerox division until 1979 when Xerox changed his status to early retirement.

Between 1964 and 1965, the UMI Board of Directors, of which Petitioner was a member, and the Xerox Board of Directors negotiated a merger of the UMI Employees' Profit Sharing Plan ("UMI Plan") into the Xerox Corporation Profit Sharing Retirement Plan ("Xerox Plan"). Among the considerations in those discussions was the fact that UMI employees would be giving up a cost of living adjustment under the Xerox Plan, as well as the fact that Xerox employees had been benefiting from the better annual employer contributions and investment yield under the Xerox Plan.

It was ultimately agreed by the two Boards of Directors that the UMI Plan funds would be transferred into the Optional (now Savings) Account part of the Xerox Plan rather than the Retirement Account part. The Optional Account has certain investment flexibility features not found in the Retirement Account. Additionally the Optional Account possesses withdrawal features not

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[1] The basic facts in this matter are the subject of a Stipulation filed in the District Court prior to the hearing upon Respondents' motion for dismissal. The parties' Joint Appendix filed in the Court of Appeals contains the full text of the Stipulation, the important pleadings in this matter, and the full text of the Xerox Plan and RIGP. Since the full text of these documents is not, in Petitioner's view, "essential to a proper understanding of the case by the Court" [Supreme Court of the United States Revised Rules, 19.1], Petitioner has neither requested certification of the record by the Clerk of the Court of Appeals at this time, nor has he included these documents in his Appendix to this Petition.

present in the Retirement Account. Finally the UMI Plan funds were to remain vested; and the Optional Account already provided for immediate vesting, whereas the Retirement Account did not.

The Xerox Board met on February 11, 1965, and passed the following amendment to the Xerox Plan:

> "6. The interest of each participant in the assets of the trust under the Microfilm Plan as of December 31, 1964 (including such participant's share of the contribution by University Microfilms, Inc. for the calendar year 1964) shall be . . . credited to his Optional Account under the Xerox Plan."

The next day, February 12, 1965, the UMI Board convened to consider the same amendment. A resolution which was passed at the meeting stated, in pertinent part, as follows:

> ". . . the amendment provides for the consolidation of the Microfilm Plan . . . with the Xerox Plan . . . and [for] the special terms and conditions upon which this corporation and its employees will participate in the Xerox Plan."

The UMI Board then adopted the amendment language which had been passed by the Xerox Board the day before.

The UMI and the Xerox Plans were thus consolidated, and the UMI Plan funds were transferred into the Xerox Plan Optional Account in accordance with the instrument providing for and governing the transfer (i.e. the February 11, 1965 amendment to the Xerox Plan). The November 24, 1965 Prospectus for the Xerox Corporation Profit Sharing Retirement Plan for the Employees of University Microfilms, Inc. refers to these events and states, in pertinent part, that:

"Your account balance as of December 31, 1964 under the UMI Profit Sharing Plan is now credited to the Optional Account. You are, of course, *fully vested* in these funds." (Emphasis in the original)

In addition to UMI, Xerox acquired several other companies which maintained their own pension plans, and merged those plans or their assets with the Xerox Plan. These other acquired-company funds were also transferred into the Optional (or Savings) Account of the Xerox Plan. The details of these mergers are not yet known since Petitioner's ERISA claim was dismissed by the District Court before discovery could be undertaken.

From 1965 until 1975, Xerox continued to tell its employees, including former UMI and other acquired-company employees, that all money in their Optional Accounts was fully vested. The 1967 Xerox Education Division publication, *People and Progress,* for instance, told employees to "[r]emember, you are always fully vested in all money deferred in the Optional Account." The 1968 booklet, *You and Xerox,* showed a chart containing the following words:

Optional Account
You are always
100% vested

Successive publications issued by Xerox repeated the message, assuring employees of the 100% vesting of funds in their Optional Accounts. Moreover, employees annually received from Xerox a "Value Added" statement which showed funds placed in the Optional Account at their value current as of the date of the statement.

In 1975, Xerox issued a Restatement of the Xerox Plan. Section 4.09 of that Restatement, pertaining to acquired-company funds, declares, in pertinent part, that:

> ". . . The amounts transferred to this Plan . . . shall be allocated to Company Savings, Retirement, and Employee Savings Accounts . . . in accordance with the instrument providing for and governing such transfer."

Section 12.02 of the Restatement, echoing §§ 403(c)(1), 404(a)(1), and 406 of ERISA, goes on to say that:

> "No amendment, alteration, modification or suspension shall
>
> * * *
>
> (b) vest in the Employer any right, title or interest in or to any property or funds held hereunder;
>
> (c) divert any part of the Trust for purposes other than the exclusive benefit of the Participants or their beneficiaries."

Despite the 1965 amendment to the Xerox Plan providing for and governing the transfer of the UMI Plan funds into the Optional Account and despite Sections 4.09 and 12.02 of the 1975 Restatement of the Xerox Plan, sometime in 1975 Xerox unilaterally decided to take pre-Xerox acquired-company funds, including the UMI Plan funds, out of the Optional Account and put them into the Retirement Account. The actual dates of this second transfer are a matter of dispute between the parties. Petitioner takes the position they have occurred since 1978; Xerox, sometime earlier. Whatever the precise dates, the second transfer of the funds is now complete.

Having made the unilateral decision to transfer pre-Xerox acquired-company funds from the Optional (now Savings) Account into the Retirement Account, Xerox formally adopted, in 1977, the Retirement Income Guarantee Plan ("RIGP") for the stated purpose of ensuring a basic, minimum retirement income for all RIGP participants. Under RIGP, each participant's Retirement Account is offset against his or her RIGP basic retirement benefit. The pre-Xerox acquired-company funds, including the UMI Plan funds, having been transferred from the Optional to the Retirement Account, are included in the Retirement Account funds offset against the RIGP basic retirement benefit. The actual effect of the offset on each participant's RIGP benefit depends on the amount of money in that participant's Retirement Account. If a participant's Retirement Account is made large enough to purchase an annuity in an amount which exceeds the RIGP benefit, then there will be no RIGP benefit at all for that participant.

The transfer of funds from the Optional Account to the Retirement Account has had serious effects upon Petitioner and those similarly situated. But for the transfer, these employees would have been entitled to the full value of their pre-Xerox funds plus the minimum retirement income guaranteed under RIGP. With the transfer, these employees find their guaranteed retirement income benefit reduced by the value of their pre-Xerox acquired-company funds. For Petitioner, as an example, the difference is approximately thirty thousand ($30,000.00) dollars. For all employees similarly situated, the total difference is apparently in the millions of dollars, the exact amount not yet having been determined as of the time Count I was dismissed.[2]

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[2] During oral argument before the Sixth Circuit, counsel for Respondents did not object to Petitioner's estimate of "millions of dollars."

Moreover, as a result of the transfer, acquired-company employees have been singled out and treated differently from other Xerox employees, none of whose Optional Account funds have been transferred to the Retirement Account. In addition, the acquired-company employees have lost the investment flexibility and the withdrawal possibilities associated with the Optional Account.

In RIGP, Xerox has thus been able to establish an employee benefit of considerable value in attracting and maintaining a loyal, stable work force. By transferring millions of dollars in pre-Xerox acquired-company funds to be used to lower Xerox's costs under RIGP, Xerox has rendered establishment of that benefit significantly more affordable.

It is the position of Petitioner that both the transfer of pre-Xerox acquired-company funds from the Optional to the Retirement Account and the subsequent use of those funds as an offset against RIGP violate § 403(c)(1) of ERISA and the correlative provisions in §§ 404(a)(1) and 406.

ARGUMENT

This case concerns an important question of federal law. It is a question which has not been, but should be, settled by this Court. The United States Court of Appeals for the Sixth Circuit has decided the question in a manner which, Petitioner respectfully contends, misconstrues and misapplies a key provision of ERISA, thus frustrating the very purpose for which ERISA was enacted, namely, "to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . ." § 2(b) of ERISA; 29 U.S.C. 1001(b).

I.

ERISA IS ROOTED IN PRINCIPLES OF EMPLOYEE PROTECTION AND EXCLUSIVE PURPOSE.

§ 403(c)(1) of ERISA, 29 U.S.C. § 1103(c)(1), provides, in pertinent part, as follows:

> ". . . the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

Regarding § 403(c)(1), this Court has stated, in *N.L.R.B.* v. *Amax Coal Co.*, 453 U.S. 322, 333 (1981):

> ". . . the fiduciary requirements of ERISA specifically insulate the trust from the employer's interest. Except in circumstances involving excess contributions or termination of the trust, 'the assets of a plan shall never inure to the benefit of an employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.' § 403(c)(1). 29 U.S.C. § 1103(c)(1) . . ."

See also: Fine v. *Semet*, 514 F. Supp. 34, 43-44 (S.D. Fla. 1981) (". . . Congress was explicit in its prohibition on employer self-dealing, 29 U.S.C. § 1103(c)(1) . . ."); *Winpisinger* v. *Aurora Corp. of Ill., Etc.*, 456 F. Supp. 559, 565-566 (N.D. Ohio 1978) (". . . fiduciary duty . . . in § 1104(a)(1) is made subject to . . . § 1103(c) . . . forever forbidding employer self-dealing in the Fund's assets").

Other ERISA provisions reiterate these principles of employee protection and exclusive purpose. § 404(a)(1), 29 U.S.C. § 1104(a)(1), provides that:

". . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries;

* * *

(D) in accordance with the documents and instruments governing the plan . . ."

§ 406, 29 U.S.C. § 1106, concerning prohibited transactions, emphasizes that a party in interest may not benefit from the transfer or use of plan funds.

II.

XEROX IS ESPECIALLY OBLIGED TO ACT FAIRLY BECAUSE OF ITS SELF-ASSUMED MULTIPLICITY OF ROLES.

In the case at hand, Xerox is particularly accountable because of the multiplicity of roles assumed by it. Xerox is, at one and the same time, employer, plan sponsor, fiduciary, and plan administrator of both the Xerox Plan and RIGP. It has thus subjected itself to the full panoply of ERISA requirements, fiduciary and other. As the New York District Court held in *Donovan* v. *Bierwirth*, 538 F. Supp. 463 (E.D.N.Y. 1981), *modified on other grounds*, 680 F.2d 263 (2nd Cir. 1982), at 469:

> ". . . a trustee having dual loyalties has 'an *especial obligation* to act fairly on behalf of those concerned with the results of the action taken.' . . ." (Emphasis in original)

III.

XEROX HAS BENEFITED FROM ITS TRANSFER AND USE OF THE PRE-XEROX ACQUIRED-COMPANY FUNDS.

It is undeniable that Xerox has benefited from its transfer of the pre-Xerox acquired-company funds and their subsequent use as an offset. Financially, Xerox has been able to reduce its costs under RIGP by millions of dollars. From a non-financial perspective, Xerox has thus been significantly assisted in establishing a retirement plan valuable to the stability of its labor relations.

IV.

THE CONCERNED EMPLOYEES HAVE NOT BENEFITED AT ALL FROM XEROX'S TRANSFER AND USE OF THEIR FUNDS, BUT HAVE BEEN ADVERSELY AFFECTED.

Petitioner, on the other hand, and those similarly situated, have only lost out in the situation. Most importantly, these employees, instead of having the full value of their pre-Xerox acquired-company funds plus the retirement income guaranteed under RIGP when they retire, now receive the retirement income which is guaranteed less the value of the pre-Xerox acquired-company funds. For Petitioner, as an example, the difference has been approximately thirty thousand ($30,000.00) dollars. In addition, these employees have lost the investment flexibility attached to funds in the Savings (formerly Optional) Account, and have found themselves singled out from other employees and treated differently and disparately.

V.

XEROX'S TRANSFER OF UMI AND OTHER ACQUIRED-COMPANY FUNDS FROM THE OPTIONAL TO THE RETIREMENT ACCOUNT HAS VIOLATED THE FIDUCIARY REQUIREMENTS OF ERISA.

The transfer is contrary to the 1965 amendment to the Xerox Plan which states that UMI funds "shall be credited to [the] Optional Account"; contrary to the negotiations and understandings which led up to the 1965 amendment; contrary to at least ten (10) years of assurances by Xerox that the funds were fully vested in the Optional (now Savings) Account; contrary to Section 4.09 of the 1975 Restatement of the Xerox Plan which provides that the "amounts transferred to this Plan . . . shall be allocated to [the various accounts] . . . in accordance with the instrument providing for and governing such transfer" (i.e. the 1965 amendment); contrary to the amending provisions of the 1975 Restatement which forbid amendments or other changes to the Xerox Plan for other than the exclusive benefit of participants and their beneficiaries; and, as discussed in IV, above, contrary to the interests and benefit of acquired-company employees. Moreover the transfer has clearly been to Xerox's advantage.

Under these circumstances, it can only be concluded that the transfer of UMI and other acquired-company funds from the Optional to the Retirement Account has resulted in those funds inuring to the benefit of Xerox as employer and not being held for the exclusive purpose of providing benefits to participants and their beneficiaries. That is to say: the transfer violates § 403(c)(1) of ERISA. Likewise the transfer violates the related provisions of §§ 404(a)(1) and 406. Under § 404(a)(1), Xerox, as fiduciary, has failed to "discharge [its] duties with respect to a plan solely in the interest of the par-

ticipants and beneficiaries and . . . in accordance with the documents and instruments governing the plan." More particularly, Xerox has disregarded the 1965 amendment to the Xerox Plan providing for the original transfer of UMI Plan funds into the Optional Account and Section 4.09 of the 1975 Restatement of the Xerox Plan requiring that "[t]he amounts transferred to this Plan . . . be allocated . . . in accordance with the instrument providing for and governing such transfer." Under § 406, finally, Xerox, again as fiduciary, has engaged in a forbidden transaction "constitut[ing] a direct or indirect transfer to, or use by or for the benefit of, a party in interest [once again Xerox, as both fiduciary and employer], of . . . assets of the plan" [406(a)(1)(D)] and has "deal[t] with the assets of the plan in [the fiduciary's] own interest . . ." [406(b)(1)].

The Court of Appeals for the Sixth Circuit disagrees, saying that the transfer was only incidental and not necessary because "Xerox could have accomplished the same result by mandating in RIGP that funds in employees' optional accounts, as well as funds in their retirement accounts, be set off against RIGP" [Court of Appeals' Decision, page 6; 732 F.2d at 551]. This is simply not true.

Following the lead of the District Court, the Court of Appeals has tried to decide an issue of fact neither party placed in contention. Xerox, for good reason, has not alleged that Optional Account funds could be used for offset purposes in RIGP. By their very nature, the Optional Account Funds cannot be so used. Indeed, Xerox's whole purpose in transferring the funds was to place them in a Retirement Account which Xerox believed could be utilized as an offset to RIGP.

Furthermore, leaving the funds in the Optional Account would not resolve the question. § 403(c)(1) and

the related provisions of §§ 404(a)(1) and 406 still would forbid their use as an offset because there would be an inurement to the benefit of Xerox rather than the funds being held for the exclusive purpose of providing benefits to participants and their beneficiaries.

VI.

XEROX'S USE OF THE TRANSFERRED FUNDS AS AN OFFSET IN RIGP VIOLATES THE FIDUCIARY REQUIREMENTS OF ERISA.

ERISA is a broadly remedial statute which the Sixth Circuit itself, in the case at hand, characterizes as "resolv[ing the conflict between employee and employer/trustee interests] resoundingly on the side of the employees" [Court of Appeals' Decision, page 6; 732 F.2d at 552]. As noted earlier in this Petition, ERISA is rooted in principles of employee protection and exclusive purpose.

Nothing in the language of ERISA, in its legislative history, or in prior case law allows the kind of offset at issue in the instant cause.

Xerox, however, and the Courts which have reviewed this cause to date apparently seek to overcome these obstacles by taking the position that what is not expressly and specifically forbidden is allowed. Petitioner contends that to do this is to stand ERISA on its head.

By using the pre-Xerox acquired-company Optional (Savings) Account funds as an offset in RIGP, Xerox made itself the sole beneficiary of that use. The involved employees gained nothing; they only lost. Xerox has been able to reduce its RIGP commitment to these employees by several millions of dollars (so far as can be estimated without additional discovery).

The District Court and the Court of Appeals have found this an acceptable result on the basis of *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). *Alessi*, though, does not stand for the proposition that all offsets are allowed. The circumstances under which *Alessi* allows for offset are carefully circumscribed:

> ". . . ERISA does not mention integration with workers' compensation, and the legislative history is equally silent on this point. An argument could be advanced that Congress approved integration of pension funds only with the federal benefits expressly mentioned in the Act. A current regulation issued by the Internal Revenue Service, however, goes further, and permits integration with other benefits provided by federal law. We now must consider whether this regulation is itself consistent with ERISA." [451 U.S. 517]
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> * * *
>
> ". . . when it enacted ERISA, Congress knew of the IRS rulings permitting integration and left them in effect. These rulings do not draw the line between permissible and impermissible integration where retirees would prefer them to, and instead they include workers' compensation offsets within the ambit of permissible integration. The IRS rulings base their allowance of pension payment integration on three factors: the employer must contribute to the other benefit funds, these other funds must be designed for the general public use, and the benefits they supply must correspond to benefits available under the pension plan. The IRS employed these considerations in approving integration with workers' compensation benefits. E.g., Rev

Rul 69-421, Part 4(j), 1969-2 Cum Bull 72; Rev Rul 68-243, 1968-1 Cum Bull 157 . . ." [451 U.S. 519-520]

* * *

"Without speaking directly of its own rationale, Congress embraced such IRS rulings. See HR Conf Rep No. 93-1280, p 277 (1974), 3 Leg Hist 4544 (approving existing antidiscrimination rules). Congress thereby permitted integration along the lines already approved by the IRS, which had specifically allowed pension benefit offsets based on workers' compensation. Our judicial function is not to second-guess the policy decisions of the legislature, no matter how appealing we may find contrary rationales." [451 U.S. 521]

Xerox's dealings with the acquired-company funds do not fit within the narrow, specifically described exceptions addressed in *Alessi*. These exceptions concern only funds designed for general public use, not private pension funds. In addition, Xerox did not contribute to the acquired-company funds. Moreover, finally, this Court only allowed the workers' compensation offsets because it found that there had been earlier IRS rulings approving exactly the same kind of offsets, which rulings were known to and embraced by Congress at the time of ERISA's enactment. Xerox's actions do not and cannot satisfy the requirements of these exceptions.

The Court of Appeals, quoting the District Court, reasons that "it seems illogical to argue that pension benefits received from one employer may not be offset against a guaranteed pension amount given by the same employer" [Court of Appeals' Decision, page 5; 732 F.2d at 551]. But the Court of Appeals is both factually and legally incorrect. The pre-Xerox acquired-

company funds did not originate with Xerox, and plan participants did not "receive" these funds from Xerox. The funds antedated Xerox's acquisition of UMI and other acquired companies. There can be no illogic in arguing that § 403(c)(1) and the related provisions of ERISA say what they say and that the special conditions recognized in *Alessi* as attaching to Social Security, Railway Labor Act, and workers' compensation benefits simply do not apply to the kinds of funds at issue in the Xerox case. *Alessi* speaks to the exceptions, not to the general rule.

VII.

"VOLUNTARINESS" DOES NOT EXCUSE XEROX'S VIOLATION OF ERISA.

Both the Court of Appeals and the District Court emphasize in their decisions the so-called "voluntary" nature of the Xerox Plan and of RIGP. The Court of Appeals states, for example, that:

> ". . . we find no violation of either the letter or the spirit of ERISA in this transfer and subsequent intercompany offset of retirement funds provided by Xerox against a guaranteed minimum income pension plan also voluntarily provided by Xerox for the benefit of its employees . . ." [Court of Appeals' Decision, page 6; 732 F.2d at 551].

The emphasis is misplaced.

To begin, the Court of Appeals is in error when it says, as quoted above, that the offset was "of retirement funds provided by Xerox." The pre-Xerox acquired-company funds did not come from Xerox at all, but from the acquired companies and the employees of those companies before acquisition by Xerox.

Thus Xerox is not using Xerox funds to offset Xerox funds; it is using non-Xerox employee funds.

Second, the Court of Appeals misapprehends the nature of retirement funds. Even retirement funds contributed by an employer do not "belong" to the employer to do with as it pleases. All of the funds involved in this case are trust funds for the exclusive benefit of the trust beneficiaries (i.e. the affected employees). Xerox, by its own actions and by the mandates of ERISA, is a fiduciary with respect to those trust funds. A fiduciary can claim no right to engage in self-dealing with respect to trust funds, whether "voluntarily" created or not.

Third, even the voluntariness associated with the establishment of RIGP is not as gratuitous and disinterested as the courts below seem to imply. As the Congress itself found in § 2(a) of ERISA, 29 U.S.C. § 1001(a), employee benefit plans "have become an important factor affecting the stability of employment and the successful development of industrial relations." In establishing RIGP, Xerox has sought a happier, more contented, and more loyal work force. That is to say, through an employee benefit plan such as RIGP, an employer attempts to stabilize its employment situation and improve its industrial relations. To the extent these goals are achieved, an employer, like Xerox, can be said to benefit.

Fourth, voluntariness cannot be considered a distinguishing feature. All ERISA plans are voluntary. If voluntariness somehow insulated the employer from the obligations of ERISA, every employer and every plan would be so insulated, a result obviously absurd on its face.

Fifth, the law is clear. Although the initial establishment of a plan may be voluntary, once established, the

plan must conform to ERISA. As was noted in *Dhayer v. Weirton Steel Div. of National Steel Corp.*, 571 F. Supp. 316, 324 (N.D.W.Va. 1983):

> ". . . ERISA does not require an employer to offer any type of benefit, but, if it does so, the plan must comply with the minimum requirements of the Act."

The "voluntariness" issue, then, turns out to be no issue at all. "Voluntary" or not, Xerox's conduct is governed by, and in this case has violated, the fiduciary requirements of ERISA.

CONCLUSION

ERISA is a statute of fundamental importance. The case at hand presents an issue being addressed for the first time. What happens in this case will be the basic law on that issue. To date, the law which has been made by the District Court and the Court of Appeals is wrong. ERISA's principles of employee protection and exclusive purpose are being ignored. A Supreme Court decision setting forth certain narrow and specific exceptions to the general principles of ERISA is now being misconstrued and misapplied so as to displace those very principles. It seems no exaggeration to say that the exception is becoming the rule; and the rule, the exception. Only the Supreme Court can

settle this important issue of federal law in a manner which stands ERISA on its feet again.

Respectfully submitted,

FISCHER, FRANKLIN,
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APPENDICES

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APPENDIX A

OPINION

RECOMMENDED FOR FULL-TEXT PUBLICATION
SEE, SIXTH CIRCUIT RULE 24

(United States Court of Appeals
for the Sixth Circuit)

(Decided and Filed April 25, 1984)

(Robert G. Holliday, on behalf of himself and all other persons similarly situated, Plaintiff-Appellant, v. Xerox Corporation, Xerox Corporation Profit Sharing Retirement Plan, and Xerox Corporation Retirement Income Guaranty Plan, Defendants-Appellees — On Appeal from the United States District Court for the Eastern District of Michigan; Docket No. 83-1058)

Before: Merritt and Krupansky, Circuit Judges;
Weick, Senior Circuit Judge.

Merritt, Circuit Judge.

This is an ERISA case. Many years ago, Xerox began establishing with company funds two pension fund accounts for each employee, neither of which provided for a uniform employee minimum pension floor. The first account, labeled the "optional account," is subject to limited encroachment prior to retirement; and the second, labeled the "retirement account," is reserved solely for retirement. Both are used to purchase annuities upon the retirement of the employee. More recently, Xerox decided to fill a gap by establishing a third pension program, called the Retirement Income Guarantee Plan (RIGP), ensuring that each employee

would receive the greater of the income from his retirement account or a minimum pension each year. Under the formula devised for the new program, the annuity payments made under the retirement account, but not the payments made from the optional account, are included within the guaranteed minimum and are subtracted as a setoff in order to arrive at the amount of benefits to which a retiree is entitled.

Because some employees — those formerly employed by companies acquired by Xerox by mergers — had at the time of merger deposited their existing pension accounts in the Xerox optional or encroachment account, Xerox transferred the funds so deposited by merged employees from this account to the retirement account so that pension payments derived from these transferred funds would be used as an offset against the guaranteed payments created under the new minimum payment program.

The question presented is whether the transfer of funds from one pension account to another within the company's pension plan, and the subsequent use of those funds as a setoff in calculating the retirement income owed to employees under the new guaranteed minimum retirement income plan, violates the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1103(c)(1) (1976 & Supp. IV 1980), which prohibits an employer from misapplying pension fund assets for its own benefit.[1]

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[1] 29 U.S.C. § 1103(c)(1):

> (1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

In this interlocutory appeal under Rule 54(b), Fed. R. Civ. P., and 28 U.S.C. § 1292(b), plaintiff Robert G. Holliday contests the decision of the District Court dismissing one count of his six-count class action, and in the alternative granting a partial summary judgment to defendants Xerox Corporation and two of its affiliated pension funds. The District Court held that Xerox did not violate ERISA when it transferred funds between the two accounts. 555 F.Supp. 51 (E.D. Mich. 1982). We agree that the transfer and subsequent use of those funds as a setoff in calculating the retirement income owed to Xerox employees under a new minimum retirement income plan did not result in a prohibited benefit to Xerox under ERISA. We therefore affirm the decision of the District Court.

Plaintiff contends that Xerox's transfer of the funds from the optional accounts of the employees of the acquired company employees to the retirement accounts, and the subsequent setoff of those funds under RIGP, operates to "benefit" Xerox in violation of ERISA. ERISA was enacted in order to deal with the problems faced by retired persons who were left without pension income, either because they were not "vested" or guaranteed in a pension plan, or because the assets or the plan had been dissipated. The legislative history of the Act reveals that Congress' main concern was with "improving the fairness and effectiveness of qualified retirement plans" so that "individuals who have spent their careers in useful and socially productive work will have adequate incomes to meet their needs when they retire." H. R. Rep. No. 807, 93rd Cong., 2d Sess. 8, *reprinted in* 1974 U.S. Code Cong & Ad. News, 4670, 4676-77.

To ensure that employees who participate in pension plans "actually receive benefits and do not lose their

benefits as a result of unduly restrictive forfeiture provisions or failure of the pension plan to accumulate and retain sufficient funds to meet its obligations," *id.* at 4677, ERISA establishes minimum rules for employee participation, *see* 29 U.S.C. §§ 1051-61 (1976 & Supp. IV 1980); fiduciary standards for plan trustees, *see id.* §§ 1101-04; and an insurance program for situations where pension plans terminate with insufficient funds, *see id.* §§ 1341-48. At the same time, recognizing that pension plans are voluntarily created by employers, Congress intended to "avoid making these standards so tough that they will actually discourage the creation of new pension plans" since "[t]he purchase of this pension legislation is not to establish an ideal pension plan, but rather, to set up certain minimum standards to assure that all workers receive the pension benefits that they have earned." 119 Cong. Rec. 30,041 (1973) (remarks of Senator Bentsen).

The provision of ERISA at issue here states that "the assets of a [pension] plan *shall never inure to the benefit* of any employer and shall be held for the exclusive purposes of providing benefits to the participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1) (Supp. IV 1980). Plaintiffs urge that Xerox violated this provision by transferring funds to the retirement account and then providing that they be offset against the RIGP benefit, because in so doing, Xerox reduced the amount of money it would have to contribute to fund RIGP. According to Plaintiffs, ERISA does not contemplate that employers will set off potential income from private pension funds against the amount owed to the employee by the same employer under a separate pension fund. Moreover, plaintiffs argue, ERISA prohibits employers from taking any actions with regard to pension plans which, however incident-

ally, "inure to [the employer's] benefit" in any way. We disagree.

ERISA itself establishes that it is permissible for a pension plan to provide for the offset of social security benefits. *See* 29 U.S.C. § 1054(b)(1)(B)(iv)(1976). The Supreme Court recently applied this analysis to workers' compensation benefits, holding that pension plan provisions for offsets based on workers' compensation awards do not contravene the policies of ERISA. *See Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). Writing for a unanimous Court, Justice Marshall observed that ERISA nowhere prohibits the calculation of pension plan benefits in which "benefit levels are determined by combining pension funds with other income streams available to the retired employees," and that Congress expressly preserved this option with respect to both social security and railroad retirement benefits. *Id.* at 514. He noted that "Congress was well aware" that this practice of offsetting would "reduce the cost of pension plans to employers" and concluded that Congress "expressly acknowledged the tension between the primary goal of benefiting employees and the subsidiary goal of containing pension costs." *Id.* at 514-16.

In *Kapuscinski* v. *Plan Administrator*, 658 F.2d 427, 429 (6th Cir. 1981), this Court interpreted the Supreme Court's decision in *Alessi* and held that General Motors, as administrator of a pension plan for its employees, could deduct any workers' compensation awards from its retirees' pensions, rejecting the argument that ERISA prohibits such setoffs. We see no difference between the setoffs approved expressly in ERISA and found by the Supreme Court and this Court to be authorized by the Act, and the setoff complained of here. We agree with Judge Feikens that "it seems illogical to argue that pension benefits received from one employer may not

be offset against a guaranteed pension amount given by the same employer." Memorandum Opinion at 7, Joint App. at 39.

Plaintiff also objects to the transfer of funds to the extent that the funds were placed in the retirement account where they are set off in determining RIGP benefits. He alleges that the transfer benefitted Xerox in violation of ERISA because it, like the setoff, ultimately had the effect of reducing the amount of money Xerox has to contribute to fund RIGP. We do not see the transfer as a prohibited "benefit." As the District Court points out and as our analysis with regard to the setoff establishes, Xerox could have accomplished the same result by mandating in RIGP that funds in employees' optional accounts, as well as funds in their retirement accounts, would be set off against RIGP. Instead, Xerox simply transferred the funds, which were derived from the employees' pension funds in their earlier employment with the acquired companies, to the account which RIGP already provided should be offset. ERISA does not preclude employers from taking such steps to enforce setoffs under legitimate pension plans such as RIGP. Moreover, because RIGP provides a guaranteed minimum income, a strong argument can be made that in transferring the funds and using them as a RIGP setoff, Xerox merely reduced the amount of a net increase in the total amount it will henceforth be required to pay to fund the pensions of its retirees.

In short, we find no violation of either the letter or the spirit of ERISA in this transfer and subsequent intercompany offset of retirement funds provided by Xerox against a guaranteed minimum income pension plan also voluntarily provided by Xerox for the benefit of its employees. The language of ERISA stating that "the assets of a plan shall never inure to the benefit of

any employer" cannot be read as a prohibition against any decisions of an employer with respect to a pension plan which have the obvious primary purpose and effect of benefitting the employees, and in addition the incidental side effect of being prudent from the employer's economic perspective. As the legislative history makes clear, ERISA recognizes the inherent tension between the desire that employees retire with adequate retirement income and the practical internal pressures exerted on the trustees charged with preserving the assets of the pension fund. While ERISA resolves this conflict resoundingly on the side of the employees, Congress did not intend the Act to penalize employers for exercising their discretion to make rational economic decisions which are both in the best interests of the preservation of the fund and which are also not adverse to the employer's interests. For these reasons, we affirm Judge Feikens' decision.

APPENDIX B

OPINION

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Robert G. Holliday, on behalf of himself and all other persons similarly situated, Plaintiff, v. Xerox Corporation, a New York corporation, The Xerox Corporation Profit Sharing Retirement Plan, and The Xerox Corporation Retirement Income Guaranty Plan, Defendants — Civil Action No. 81-60054)

Defendants[1] move for dismissal or summary judgment on Counts 1-3, inclusive, of this six-count action.[2] Count I alleges a violation of the Employee Retirement Income Security Act of 1974, Pub L. 93-406, 88 Stat. 832 (codified at 29 U.S.C. §§ 1001 *et seq.* (1976)) ("ERISA"). Count II alleges breach of a contract between plaintiff and defendants. Count III alleges breach of a contract to which plaintiff is a third party beneficiary.

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[1] Plaintiff Holliday complains against Xerox Corporation, The Xerox Corporation Profit Sharing Retirement Plan, and The Xerox Corporation Retirement Income Guaranty Plan. Defendants do not distinguish among themselves, but assume that if one is liable, all are.

[2] The three counts involved in this motion are all brought on behalf of classes. Plaintiff's motion to certify the classes is pending; the parties agreed that because this motion could moot the need to consider class certification, it should be considered first. The uninvolved counts are brought by Holliday individually.

FACTS

In 1962, defendant Xerox Corporation ("Xerox") acquired University Microfilms, Inc. ("UMI"). At the time, both companies had separate pensions plans. In February 1965, the UMI Board of Directors and the Xerox Board of Directors agreed to merge the UMI Employee's Profit Sharing Plan ("UMI Plan") into defendant Xerox Corporation Profit Sharing Retirement Plan ("Xerox Plan"). The Xerox Plan is divided into two parts, referred to as the "Optional Account" and the "Retirement Account." Both accounts in the Xerox Plan and the UMI Plan are individual accounts; payments to each individual depend on the amount of money deposited on his behalf.

Pursuant to Paragraph Six of the merger document[3] which states in relevant part; "The interest of each participant in the assets of the trust under the Microfilm Plan as of December 31, 1964 . . . shall be . . . credited to his Optional Account under the Xerox Plan," the UMI Plan funds were transferred to the Optional Account of the Xerox Plan. Five other pension plans were merged into the Xerox Plan in a similar manner at various times.

The acquired company pension plan funds were merged into the Xerox Plan Optional Account, partly to insure that anyone who had a vested interest under his original plan stayed vested. For example, the UMI Plan provided for vesting after ten years, while the Xerox

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[3] The document is titled "Amendment of the Profit Sharing Retirement Plan for the Salaried Employees of Xerox Corporation, Agreement of Trust Under the Profit Sharing Retirement Plan for the Salaried Employees of Xerox Corporation and Microfilm Employees' Profit-Sharing and Trust Agreement." It was adopted by the Xerox and UMI Boards of Directors on February 11 and 12, 1965, respectively.

Plan Retirement Account then (in 1965) required fifteen years' service for full vesting. The 1975 Restatement of the Xerox Plan provides for full vesting in five years. Thus, the vesting problem no longer exists.

Under special circumstances, an individual may make a withdrawal from his Optional Account. No pre-retirement withdrawal may be made from the Retirement Account. In addition, an employee has some control over where his Optional Account money is invested. He has the choice of specified investment options, some of which may be lower yield and safer than others.

Effective July 1, 1975, Xerox adopted the "Xerox Corporation Retirement Income Guaranty Plan" ("RIGP"). RIGP guarantees that retired employees will have a minimum monthly income. The formula is complicated, but the parties agree that for the purposes of this motion, the monthly RIGP guaranty depends on an employee's salary at retirement and his years of service. The employee's social security payments and the amount payable from a life annuity purchased with the funds in his Retirement Account are subtracted from the guaranty. The remaining difference is the amount of the RIGP payment.

At various times shortly after the creation of RIGP, Xerox unilaterally transferred monies that had been put into the Optional Account when an acquired company's pension plan was merged into the Retirement Account of the Xerox Plan.[4] The transfer increased a retired employee's RIGP offset (by increasing the size of the pension payable from the Retirement Account) and thus reduced or eliminated his RIGP benefits. This

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[4] The UMI funds transfer, however, took place in February 1978.

served to lower the amount of money a retired employee would receive monthly from all defendants. The transfer and its effect on the size of a retired employee's pension check are at the heart of this lawsuit.

But for the creation of RIGP, the transfer would have had no effect on the size of a pension check.[5] Xerox gratuitously created RIGP, it is not obliged to guarantee a minimum pension to its employees. RIGP is funded entirely by Xerox.[6]

I.

In Count I, Holliday alleges that defendants violated ERISA by the establishment of RIGP and the allegedly related transfer of funds of acquired company pension plans from the Optional Account to the Retirement Account of the Xerox Plan. Holliday argues that these actions violate § 403(c)(1) of ERISA, 29 U.S.C. § 1103(c)(1), and IRC § 401 because the transfer of funds and the adoption of RIGP resulted in a reduction of potential benefits to employees and that the reduction redounded to the financial benefit of Xerox.

Supporting its motion to dismiss Count I, Xerox argues, *inter alia*, that its actions did not violate ERISA § 403(c)(1), which provides in relevant part:

> The assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries . . .

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[5] As Holliday points out, the transfer also affected investment flexibility and withdrawal availability.

[6] RIGP, Article 3, "Contributions."

The parties properly focus on whether the assets of the plan "inured" to Xerox when the funds were transferred and RIGP was established. Plaintiff alleges that the transfer from the Optional Account to the Retirement Account, in connection with the establishment of RIGP, violated § 403(c)(1) because it reduced the amount of money Xerox would have to contribute to fund RIGP. However, Xerox voluntarily established RIGP. By doing so, Xerox increased the total amount it would be required to pay to fund pension plans. When it transferred the funds from the Optional to Retirement Accounts, and used them as a RIGP offset, Xerox merely reduced the amount of that increase.

Xerox could have accomplished the same end by leaving acquired company funds in the Optional Account and mandating the offset in RIGP itself, instead it transferred them to an account which RIGP already provides should be offset. It should not be penalized for choosing a different, simpler method to reach that same end.

It is permissible for a plan to provide for an offset of social security payments[7] and workers' compensation payments.[8] Thus, it seems illogical to argue that pension benefits received from one employer may not be offset against a guaranteed pension amount given by the same employer. In *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 514-17 (1981), the Supreme Court ruled that a plan could properly include an offset provision for workers' compensation payments, and that a state could not provide that such payment were not to be offset. Referring to the concept as "integration," the Court not only said that Congresss had authorized it,

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[7] ERISA § 204(b)(1)(B)(iv), 29 U.S.C. § 1054(b)(1)(B)(iv).

[8] *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1984).

but recognized that given the goal of insuring adequate retirement incomes in an economical manner, integration provisions are wisely promulgated.

II.

In Count II, Holliday alleges the existence of a contract between the participants in the UMI Plan and Xerox regarding the transfer of funds from the UMI Plan to the Optional Account of the Xerox Plan. In Count III, he alleges that the participants in the UMI Plan have third party beneficiary status to a similar contract between Xerox and unnamed persons. Xerox moves for dismissal of Counts II and III, asserting that any contractual relationship has been preempted by § 514 of ERISA, 29 U.S.C. § 1144.[9] Xerox's theory is that any contract that may have existed was rendered unenforceable by the enactment of § 14.

Supporting this theory, Xerox relies on *Allessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), which holds that a state may not dictate by statute that workers' compensation benefits are not to be integrated with ERISA pension payments (Integration works as an offset and reduces the Plan's liability to an individual).

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[9] The relevant parts of § 514 provide:

(a) . . . the provisions of this subchapter and Subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.

* * *

(c) For the purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State . . . .

(2) The term "State" includes a State . . . which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

However, the preemption problem is irrelevant to the existence of a valid contract because nothing in ERISA indicates that Congress intended to make contracts unenforceable.[10] Rather, if the state law is preempted, then the contract must be construed in accordance with federal law, in this case the federal common law of contract. There is no substantial body of federal common law of contract. Thus, state law will be looked to as a guide. *Woodfork* v. *Marine Cooks & Stewards Union*, 642 F.2d 966, 973 (5th Cir. 1981); *Montgomery* v. *Lowe*, 507 F.Supp. 618, 620 (S.D.Tex 1981); *Shaw* v. *Kruidenier*, 470 F.Supp. 1375, 1382 (S.D. Iowa 1979), *aff'd*, 620 F.2d 307 (8th Cir. 1980); *Bacon* v. *Wong*, 445 F. Supp. 1189, 1192 (N.D. Calif. 1979). Whether ERISA preempts state law in this case makes no difference. If federal law applies, state law will be used as indicative of how the contract should be interpreted. Preemption would not make the contract a nullity.

Xerox's motion to dismiss Counts II and III on preemption grounds is denied. The alleged contract may be construed under either state common law or federal common law, which will look to state law as a guide. If federal law is applied in construing the contract, the Court will reach the same result that would be required if the contract was construed under state law.

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[10] Preemption is "a doctrine which ousts *a state or other government* from the exercise of its *police power* in an area in which the power of the federal government is, by law . . . preeminent." *Owen* v. *Atlanta*, 157 Ga.App. 354, 277 S.E.2d 338 (emphasis in original), *aff'd*, 248 Ga. 299, 282 S.E.2d 906 (1981), *cert. denied*, __ U.S. __, 102 S.Ct 2235 (1982). "Preemption indicates a complete take-over of a field . . . to the exclusion of all interference . . ." *P. Lorillard Co.* v. *Seattle*, 8 Wash.App. 510, 507 P.2d 1212, 1216 (1973). Preemption does not mean, as Xerox maintains, that contracts are necessarily unenforceable; it merely means that federal, rather than state law, applies. In the absence of a direct conflict between state and federal law, there is no reason to assume that the result which would have been reached according to state law will not be reached via federal law.

III.

Xerox moved for summary judgment on all three counts because they are time barred. In order for Xerox to prevail on this theory, regarding Counts II and III, ERISA and its three-year limitation of action provision[11] must apply and that the three-year period must have been exceeded. Holliday filed his complaint on March 27, 1981. Thus, if he knew of the actions which he claims violate ERISA before March 27, 1978, and if ERISA and its limitation section applies, his action is time barred.

According to ERISA's "Coverage" provision, 29 U.S.C. § 1003(a), ERISA applies only to employee benefit plans. Both "welfare plans" and "pension plans" are "employee benefit plans." 29 U.S.C. § 1002. Both the Xerox Plan and RIGP are "pension plans" as defined in 29 U.S.C. § 1002(2).[12] The document[13] which plaintiff

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11 ERISA's limitation of actions section, 29 U.S.C. 1113(a)(2), provides that no action may be brought "three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation."

12 As defined by 29 U.S.C. § 1002(2), a "pension plan" is

> . . . any plan, fund, or program . . . maintained by an employer . . . to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program —
>
> (A) provides retirement income to employees, or
>
> (B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . .

13 The document is captioned: "Amendment of The Profit Sharing Retirement Plan For The Salaried Employees Of Xerox Corporation, Agreement Of Trust Under The Profit Sharing Retirement Plan For The Salaried Employees Of Xerox Corporation, and Microfilm Employees' Profit-Sharing And Trust Agreement," and was agreed to by the Xerox and UMI Boards of Directors at meetings on February 11 and 12, 1965, respectively.

claims gives him contract rights in an agreement ("the agreement") between Xerox, UMI and the Xerox Plan trustee to merge the two pension plans. To facilitate the merger, certain provisions of the Xerox Plan had to be amended. The amendments appear in paragraphs 8 and 9 of the agreement. They became part of the Xerox Plan and thus are covered by ERISA. However, plaintiff Holliday alleges a violation of paragraph 6 of the agreement, which provides in relevant part: "The interest of each participant in the assets of the trust under the Microfilm Plan as of December 31, 1964 . . . shall be . . . credited to his Optional Account under the Xerox Plan."[14] This provision is contractual and ancillary to the consolidation of the Xerox and UMI plans. Thus it is not covered by ERISA. *See Jervis* v. *Elerding*, 504 F.Supp. 606 (C.D. Calif. 1980), which holds that a contract relating to post employment compensation is not covered by ERISA.

Because the merger agreement is not a pension plan under ERISA, ERISA's limitation of actions provision does not apply. Rather, the Michigan law of contracts, and its statutory limitation of actions provision, applies.[15]

On this ground the motion is likewise denied.

/s/ John Feikens
Chief United States District Judge

Dated: October 26, 1982

(*Certification Omitted*)

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[14] Holliday reads into this language an obligation by Xerox to keep the funds in the Optional Account.

[15] Michigan's general rule provides for a six-year limitation of actions period on contract claims. Mich. Comp. Laws § 600.5807(8).

APPENDIX C

ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed October 26, 1982)

(Robert G. Holliday, on behalf of himself and all other persons similarly situated, Plaintiff, v. Xerox Corporation, a New York corporation, The Xerox Corporation Profit Sharing Retirement Plan, and The Xerox Corporation Retirement Income Guaranty Plan, Defendants — Civil Action No. 81-60054)

For the reasons set out in the accompanying opinion,

It Is Ordered that defendants' motion to dismiss, or in the alternative for partial summary judgment, is Granted regarding Count I of the complaint, which is hereby Dismissed.

It Is Further Ordered that defendants' motion to dismiss, or in the alternative for partial summary judgment, is Denied regarding Counts II and III of the complaint.

/s/ John Feikens
Chief United States District Judge

Dated: October 26, 1982

(Certification Omitted)

APPENDIX D

SUPPLEMENTAL OPINION

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed December 28, 1982)

(Robert G. Holliday, on behalf of himself and all other persons similarly situated, Plaintiff, v. Xerox Corporation, a New York corporation, The Xerox Corporation Profit Sharing Retirement Plan, and The Xerox Corporation Retirement Income Guaranty Plan, Defendants — Civil Action No. 81-60054)

On October 26, 1982, I issued an opinion and order dismissing Count I of this six-count action.[1] Plaintiff now asks me to reconsider my decision. In the alternative, he asks that I amend the order by adding language which will permit interlocutory appeal. In a separate motion, he asks for an order of final judgment as to Count I.

I.

RECONSIDERATION

Local Rule 17(k) governs motions for reconsideration. No response is allowed. (Local Rule 17(k)(2)). Thus I must determine from plaintiff's submissions whether "a palpable defect by which the Court and the parties have been misled . . ." (Local Rule 17(k)(3)) has occurred.

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[1] In the opinion and the order, I denied defendants' motion to dismiss Counts II and III.

Plaintiff raises two basic points. First he argues that the transfer of funds from the Optional Account to the Retirement Account violated ERISA § 403(c)(1) in and of itself, the transfer of funds notwithstanding. I did not rule on that question specifically. However, I ruled that the transfer and its accompanying offset were not violative of ERISA, it follows "by reasonable implication" (Local Rule 17(k)(3)) that the validity of the transfer standing alone was considered.

Second, plaintiff notes that Optional Account funds are employee funds. He contends that employee funds cannot be used as an offset. However, he cites no law, and I am aware of none, prohibiting employee funds from being used to offset RIGP's guarantee. Confronted merely with the bald assertion that employee funds may not be offset against the RIGP guarantee, I am unwilling to reconsider my decision.

II.

INTERLOCUTORY APPEAL

Plaintiff asks me to amend the order dismissing Count I by adding language stating that it decided "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." 28 U.S.C. § 1292(b). This amendment would allow plaintiff to ask the Court of Appeals for permission to undertake an interlocutory appeal. Fed.R.App.P.5(a).

Section 1292(b) sets out a four-part test: (1) The question involved must be one of "law"; (2) it must be "controlling"; (3) there must be substantial ground for "differences of opinion" about it; and (4) an immediate appeal must "materially advance the ultimate termination of the litigation." *Cardwell* v. *Chesapeake &*

Ohio Ry., 504 F.2d 444, 446 (6th Cir. 1974). Clearly there is a question of law which controls — whether the transfer of funds from the Retirement to the Optional Account, and the accompanying use of the transferred funds as a RIGP offset are prohibited by ERISA. It is a question of law because there are no substantial disputed facts relating to the ERISA claim. I dismissed Count I because I found that ERISA does not prohibit the transfer and offset. If the transfer and offset is prohibited by ERISA, then plaintiff would be entitled to judgment. Thus the legal question is controlling.

There is also substantial ground for difference of opinion. This is a question of first impression regarding interpretation of an ambiguous statutory provision. *See Zenith Radio Corp.* v. *Matshushita Electric Industrial Co.*, 494 F.Supp. 1190, 1243 (E.D.Pa. 1980).

The final question is whether an immediate appeal "may materially advance the ultimate termination of the litigation." § 1292(b). Under my order, this litigation is already terminated for the members of the putative acquired companies class who are not members of the smaller (but wholly included) putative UMI class. If Holliday is permitted to take an interlocutory appeal on behalf of the members of the acquired companies class, resolution of their rights under ERISA may be decided more quickly than if no interlocutory appeal is allowed.

An immediate interlocutory appeal may materially advance the ultimate termination of this litigation. If plaintiff ultimately prevails on the contract claim (Counts II and III), there will have been findings of fact and a full analysis of all claims except Count I. If the Court of Appeals then disagrees with my decision to dismiss Count I, it will be necessary to reopen the proofs to determine the question of certification of the acquired companies class, and to reach a decision on

the merits of Count I. This would likely entail evidentiary hearings to some extent duplicative of those conducted in determining the merits of the claim under Counts II and III. Any findings made on remand would be subject to review by the Court of Appeals a second time.

Conversely, if an immediate appeal is heard, the Court of Appeals will have the opportunity to rule on an expedited basis whether or not Count I states a claim upon which relief can be granted. If it does, the ERISA claim can be litigated along with all other claims in this action. There will be a full record supporting decisions on each count. If it then decides my decision is erroneous, it will not be necessary to remand the case for further findings of fact regarding Count I. Then I will certify an interlocutory appeal.

III.

FINAL JUDGMENT

Plaintiff moves for the entry of final judgment on Count I pursuant to Fed.R.Civ.P.54(b). Rule 54(b) gives the District Court discretion to enter final judgment on one "claim for relief" in a multiclaim action, or for less than all the parties in a multiparty action "only upon an express determination that there is no just reason for delay." Noting that the ERISA claim has been finally decided and that the number of potential plaintiffs has been dramatically reduced, plaintiff contends that it is appropriate to enter final judgment.

In *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1 (1980), the Supreme Court reaffirmed its decisions in the companion cases of *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427 (1956), and *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U.S. 445 (1956). Under these decisions, the District Court is to act as a dis-

patcher and use its discretion "to determine the 'appropriate time' when each decision in a multiple claims action is ready for appeal." *Curtiss-Wright*, 446 U.S. at 8, *quoting Sears, Roebuck*, 351 U.S. at 435.

However, in order to reach the discretionary phase of a Rule 54(b) motion,

> [a] district court must first determine that it is dealing with a "final judgment." It must be a "judgment" in the sense that it is a decision upon a cognizable claim for relief, and it must be "final" in the sense that it is "an ultimate disposition of an individual claim entered in the course of a multiple claims action."

Curtiss-Wright, 446 U.S. at 7, *quoting Sears, Roebuck*, 351 U.S. at 436.

My decision to dismiss Count I is a final judgment in two respects. It adjudicates all the claims of the members of the putative acquired companies class who are not members of the putative UMI class. They have no interest in the outcome of any further aspect of this litigation. A decision on a class action claim which dismisses "the complaint against the absent class members is a final judgment as to them." *Windham* v. *American Brands, Inc.*, 68 F.R.D. 641, 660 (D.S.C. 1975), *rev'd on other grounds*, 539 F.2d 1016 (4th Cir. 1976), *rev'd*, 565 F.2d 59 (4th Cir. 1977) (en banc), *cert. denied*, 435 U.S. 968 (1978).

This is also a final judgment on a cognizable claim for relief — the ERISA claim. "[T]he concept of a 'claim' under Rule 54(b) denotes 'the aggregate of operative facts which give rise to a right enforceable in the courts.'" *McIntyre* v. *First National Bank of Cincinnati*, 585 F.2d 190, 192 (6th Cir. 1978) (citations omitted). While Count I alleges some of the same facts as Counts

II and III, the universe of relevant facts is much larger for them than for Count I. Count I alleges that the transfer and offset violate ERISA. Counts II and III allege that there was a contract created prohibiting the transfer. To determine the contract claims it will be necessary to determine whether a contract was actually created. The significance of other claims "for Rule 54(b) purposes turns on their interrelationship with the claims on which certification is sought." *Curtiss-Wright*, 446 U.S. at 9. Severability of the decided and remaining claims is sufficient. *Id.*

> [T]he relationship of the adjudicated claims to the unadjudicated claims is one of the factors which the District Court can consider in the exercise of its discretion. If the District Court certifies a final order on a claim which arises out of the same transaction and occurrence as pending claims, and the Court of Appeals is satisfied that there has been no abuse of discretion, the order is appealable.

Cold Metal, 351 U.S. at 452.

While the Court of Appeals may "have to face the same issues on a subsequent appeal [of Counts II and III], this might perhaps be offset by a finding that an appellate resolution of the certified claims would facilitate a settlement of the remainder of the claims." *Curtiss-Wright*, 446 U.S. at 8, n.2. Here an appellate decision on Count I which is favorable to plaintiffs would probably lead to settlement of Counts II and III. This is because the relief asked in Counts II and III would be granted if plaintiff prevails on Count I.

Thus, I find that Count I states a different claim for relief than Counts II and III within the meaning of Rule 54(b). I further find that this is a multiple plaintiff action.

The District Court is to use its judgment as a dispatcher to determine whether there is any just reason for delay. *Curtiss-Wright*. As discussed above, the factual setting of Count I is similar to that of Counts II and III. However, only a small part of those facts relevant to a decision of Counts II and III are relevant for a decision on Count I. Further, I find that an appellate decision favorable to plaintiff on Count I would likely instigate a settlement of the remaining counts. Thus I find Count I is ready for appellate review.

IV.

CONCLUSION

I am not convinced that there is a "palpable defect" in my decision to dismiss the ERISA claim as required for motions to reconsider to be granted. (Local Rule 17(k)). Thus, plaintiff's motion to reconsider is denied.

Because my decision on ERISA decided "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." 28 U.S.C. § 1292(b). An interlocutory appeal, heard on an expedited basis by the Court of Appeals could lead to a settlement of this litigation. If my decision on Count I is remanded, I would need to take evidence only once. There would be no need to take evidence on Count I after full evidentiary hearings on Counts II and III have been concluded.

My decision on Count I is a final judgment on the ERISA claim. It is also a final judgment regarding the members of the putative acquired companies class who are not members of the UMI class. Further, because the ERISA claim is a legal one, arising from a smaller set of facts than the contract claims, final judgment, allowing

an immediate appeal, would not violate the policy against piecemeal appeals.

An appropriate order is entered herewith.

/s/ John Feikens
Chief United States District Judge

Dated: Dec. 28, 1982

(Certification Omitted)

APPENDIX E

ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated December 28, 1982)

(Robert G. Holliday, on behalf of himself and all other persons similarly situated, Plaintiff, v. Xerox Corporation, a New York corporation, The Xerox Corporation Profit Sharing Retirement Plan, and The Xerox Corporation Retirement Income Guaranty Plan, Defendants — Civil Action No. 81-60054)

For the reasons set forth in the accompanying supplemental opinion,

It Is Ordered that my order in this matter of October 26, 1982, be, and hereby is, amended by adding the following language:

> "Dismissal of Count I involves a controlling question of law as to which there is substantial ground for difference of opinion. An immediate appeal from this order may materially advance the ultimate termination of this litigation.
>
> "It Is Further Ordered that final judgment be, and hereby is, entered for defendants and against plaintiff on Count I."

/s/ John Feikens
Chief United States District Judge

Dated: Dec. 28, 1982

(*Certification Omitted*)

APPENDIX F

JUDGMENT

(United States Court of Appeals
for the Sixth Circuit)

(Filed April 25, 1984)

(Robert G. Holliday, on behalf of himself and all other persons similarly situated, Plaintiff-Appellant, v. Xerox Corporation, et al, Defendants-Appellees — Docket No. 83-1058)

Before: Merritt and Krupansky, Circuit Judges;
Weick, Senior Circuit Judge.

On Appeal from the United States District Court for the Eastern District of Michigan.

This Cause came on to be heard on the record from the said District Court and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

Entered By Order Of The Court

/s/ John P. Hehman,
Clerk

Issued as Mandate: May 17, 1984
Costs: None

(*Certification Omitted*)

(3)

No. 84-133

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT G. HOLLIDAY, on behalf of himself and all other persons similarly situated,

Petitioner,

—v.—

XEROX CORPORATION, a New York corporation, THE XEROX CORPORATION EMPLOYEES PROFIT SHARING RETIREMENT PLAN, and THE XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

ALFRED H. HODDINOTT, JR.
Attorney for Respondents
800 Long Ridge Road
Stamford, Connecticut 06904
(203) 359-5430

September 21, 1984

2418

QUESTION PRESENTED

When the trustee of a pension plan has transferred employer-contributed funds from one fully vested and nonforfeitable account to another account within the plan that is also fully vested and nonforfeitable, is it a violation of Section 403(c)(1) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1103(c)(1)(Supp. IV 1980), if the trustee thereafter utilizes those funds as a "setoff" in determining pension benefits at retirement in another plan that requires such a setoff?

LIST OF PARTIES

The parties to this proceeding are as listed in the caption. Pursuant to Supreme Court Rule 28.1, respondent Xerox Corporation ("Xerox") states that it has no parent or affiliates.

Xerox has seven United States subsidiaries which are not wholly owned—American Health Capital HIBI Management, Inc., a New York corporation, Dimensional Corporate Finance, Inc., a corporation of California, Financial Guaranty Associates, Inc., a corporation of Wisconsin, International Marine Underwriters of New England, Inc., a corporation of Massachusetts, LWB Syndicate Inc., a corporation of Illinois, Rank Xerox Business Equipment, Inc., a Delaware corporation, and The Genra Group, Inc., a Texas corporation.

Xerox also has other subsidiaries, as defined by the Securities and Exchange Commission, in a number of foreign countries: Burobail S.A., Copicentro S.A., Copicentros, S.A., Expro-Companhia de Comercio Exterior, Fuji Xerox Company Limited, Globe Park Management Limited, Indian Xerographic Systems Private, Ltd., Industrias Xerograficas, S.A. de C.V., Investissements Xerographiques Marocains S.A., Korea Xerox Company Ltd., Magua, S.A., Metalquimica de Bahia S.A. Industria Mecanica E. Quimica, Omnium de Participantions Mercure S.A., Philippine Fuji Xerox Corporation, Rank Xerox (Australia) Pty Limited, Rank Xerox Espanola S.A., Rank Xerox (Finance) Pty Limited, Rank Xerox Greece S.A., Rank Xerox Holding, B.V., Rank Xerox Investments Limited, Rank Xerox Limited, Rank Xerox New Zealand Ltd., Rank Xerox (Nigeria) Limited, Rank Xerox (Sales) Pty Limited, Roxfin (Proprietary) Limited, Societe Industrielle Rank Xerox S.A., Taiwan Fuji Xerox Corporation, Thai Xerographic Systems Co. Ltd., Versatec GmbH, Xerox Antilliana N.V., Xerox de Bolivia Limitada, Xerox do Brasil, S.A., Xerox de Colombia, S.A., Xerox Dominicana, C. por A., Xerox Egypt SAE, Xerox de El Salvador, S.A. de C.V., Xerox

d'Haiti, S.A., Xerox de Honduras, S.A., Xerox (Jamaica) Limited, Xerox Maroc, S.A., Xerox de Panama, S.A., Xerox del Paraguay SRL, Xerox del Peru, S.A., Xerox Servicios Tecnicos, C.A., Xerox Trinidad Limited, and Xerox de Venezuela, C.A.

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TABLE OF AUTHORITIES

STATUTES AND RULES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT G. HOLLIDAY, on behalf of himself and all other persons similarly situated,

Petitioner,

—v.—

XEROX CORPORATION, a New York corporation, THE XEROX CORPORATION EMPLOYEES PROFIT SHARING RETIREMENT PLAN, and THE XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Sixth Circuit Court of Appeals' decision in this case, which is reported at 732 F.2d 548.

STATEMENT OF THE CASE[1]

This is a class action brought by petitioner Robert G. Holliday ("Holliday") against respondents Xerox Corporation and two employee benefit plans it maintains, The Xerox Corporation Employees Profit Sharing Retirement Plan (the "Xerox Plan") and The Xerox Corporation Retirement Income Guarantee Plan ("RIGP"). Holliday had been employed by University Microfilms, Inc. ("UMI") before its acquisition by Xerox in 1962. His claim involves the disposition of funds contained in an employee benefit plan maintained by UMI (the "UMI Plan"), which was subsequently merged into the Xerox Plan in 1965. The courts below unanimously ruled that Xerox did not violate Section 403(c)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829, 876 (codified as amended at 29 U.S.C. § 1103(c)(1) (Supp. IV 1980)), when it transferred those funds from one account to another within the Xerox Plan, concluding that the transfer and subsequent use of those funds as a deduction or "setoff" in determining retirement income of Plan participants did not result in a prohibited "benefit" to Xerox.[2]

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1 For the purposes of this Brief, respondents agree to the "Reports of Opinions Below", "Statement of Jurisdiction" and "Statutory Provisions" sections of the Petition, and therefore have not reproduced them here. Sup. Ct. R. 34.2. All of the facts are undisputed and contained in the Complaint, the Plan documents or the Stipulation of Facts. Pursuant to Supreme Court Rule 19, respondents have requested certification of the printed appendix on appeal, which contains those documents.

2 This claim, contained in Count I of the Complaint, is asserted on behalf of plan participants originally employed by six acquired companies whose pension funds were merged into the Xerox Plan. The United States Court of Appeals for the Sixth Circuit affirmed the dismissal or, in the alternative, the entry of partial summary judgment as to Count I. Fed. R. Civ. P. 12, 56. Petitioner seeks a writ of certiorari to reverse that decision. Still before the district court (and therefore not at issue here) is plaintiff's claim that the transfer constituted a breach of contract as to the UMI Plan, in violation of state law.

The Xerox Plan is a pension plan covering practically all Xerox employees. An employee's holdings in the Plan are invested in two accounts, the "Retirement Account" and the "Optional Account". The funds in the Retirement Account are contributed by Xerox to the "General Fund", where they are invested in securities without a limited or fixed income. Xerox also contributes to the Optional Account. At the participant's option, he or she may take that money in cash or have it invested in the General Fund, the "Guaranteed Fund" (invested in securities with a guaranteed rate of return), or the "Xerox Stock Fund" (invested in Xerox common stock). Unlike the Retirement Account, in case of a "hardship" (financial need arising from sickness, disability or to finance the purchase of a home), a participant may withdraw money from the Optional Account with the approval of the Trustee.

Over the years, Xerox made a number of acquisitions of companies that had their own pension plans, six of which were merged into the Xerox Plan. The mergers were accomplished by placing the pension funds of the acquired company plans ("pre-Xerox funds" or "acquired company funds") into each participant's Optional Account in the Xerox Plan, since it was the only account which at that time assured immediate 100% vesting of the funds, as required by tax law. The funds were not placed in the employee's Retirement Account because its funds were not fully vested, and therefore were forfeitable if, like many of the employees in question, he had less than 15 years of service.

In 1975, Xerox reviewed the Xerox Plan and concluded that maintaining the pre-Xerox funds from the acquired companies in the Optional Account was inconsistent with the objective that they provide retirement security, since the characteristics of the Optional Account, including the ability to siphon off the funds for "hardship", could result in their being depleted before retirement. Accordingly, the pre-Xerox funds were transferred from each participant's Optional Account to his Retirement Account, because by that time the Xerox Plan had been amended to provide for complete vesting of the Retire-

ment Account after 5 years of service, eliminating the vesting problem that existed when the plans were originally merged. Moreover, the Retirement Account did not provide the withdrawal options available in the Optional Account, and thus it furthered the objective that these funds provide retirement security. *It is undisputed that whatever account the money was in, the participants were always fully vested, the funds were always nonforfeitable, and Xerox always had the absolute discretion to determine the form, time and manner of payment at retirement.*

The funds that were transferred were *not*, as petitioner contends, "private, employee funds". Statement of Question, Petition at i. The transfer involved pension funds meant for retirement, namely, the pre-Xerox funds contributed by the acquired companies. Contributions made by Xerox or employees to the Optional Accounts after the mergers were not transferred; that money remained in the Optional Accounts. Thus, in most cases the Optional Accounts were not depleted by the transfer but were only diminished, and the sum total of a participant's holdings in his Retirement Account and his Optional Account was not affected by the transfer.

On July 1, 1977, Xerox instituted the Retirement Income Guarantee Plan ("RIGP") to ensure a minimum retirement income level for all eligible Xerox employees.[3] Prior to RIGP, no Xerox Plan participant enjoyed this benefit because the Xerox Plan did not specify a fixed income level for each participant at retirement. His retirement income would be based on whatever funds were in his individual Retirement Account, which could vary greatly because of factors such as salary and length of service. Therefore Xerox adopted RIGP,

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3 While petitioner asserts that the transfers were made to facilitate the use of the funds as a RIGP offset for Xerox' benefit (Petition at 18), the fact is that, as he concedes (Petition at 11), the decision to transfer the funds took place in 1975, but the amendments to the Internal Revenue Code which facilitated RIGP were not enacted until 1976, and RIGP did not become effective until 1977.

under which each participant is guaranteed a minimum income level at retirement, irrespective of what may be in his individual account.

In operation, a participant's normal monthly retirement income (the "RIGP benefit") is computed based on his salary, years of service, and age at retirement. Then certain subtractions (called "offsets" or "setoffs") are made from that monthly income, including a percentage of the participant's social security benefits and the amount which would be payable monthly under a life annuity purchased with his Retirement Account. If a participant's Retirement Account purchases an annuity that exceeds the RIGP benefit, he receives that higher amount. But if his Retirement Account purchases an annuity which together with other designated setoffs is less than the RIGP benefit, RIGP makes up the difference.

Xerox voluntarily adopted RIGP; it was not obligated to. But having done so, it chose to apply RIGP in an evenhanded manner to all its employees. All past years of service are included in determining the RIGP benefit, including the pre-Xerox years of service of participants employed by companies later acquired by Xerox (in Holliday's case, his years at UMI), thus maximizing the years of service (and retirement income) of all employees. Therefore the benefit is applied in a nondiscriminatory way to all participating Xerox employees. But to ensure that the setoffs are also equal, the pre-Xerox contributions of the acquired companies, now placed in the Retirement Account, are also set off, the same as the contributions Xerox made for its employees during those years. Making an exception for the acquired company employees and leaving their pre-Xerox funds in the Optional Account, where they would not be set off, would be unfair and would have bestowed on them a windfall benefit not available to other Plan participants, all of whose retirement funds are included for setoff purposes.

Petitioner objects to the transfer to the extent that the funds were placed in an account where they will be set off in determing RIGP benefits, since it is undisputed that he is (and always has been) fully vested in those funds, and will receive them at retirement. He claims that the setoff of those funds in determining any RIGP benefit diverted the funds "to the benefit" of Xerox by reducing Xerox' liability under RIGP, and thus somehow violated ERISA. The legality of that setoff is, therefore, the only issue raised here.[4]

4 Holliday specifically abandoned below any claim that he was damaged because the transfer resulted in a loss of investment flexibility, and he has never before alleged "disparate treatment". Accordingly, those claims (Petition 12-13, 16) "were neither raised before nor considered by the Court of Appeals" and should not be considered on this petition. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

SUMMARY OF REASONS WHY THE WRIT SHOULD BE DENIED

I. The decision below does not satisfy the requirements for review on writ of certiorari because

A. it is merely an application of the principle already settled by the Supreme Court in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) ("Alessi");

B. it is not in conflict with any decision of this Court;

C. it does not create a conflict within the courts of appeals;

D. it is limited to its peculiar facts; and

E. it does not raise an important issue.

II. The decision below is correct. Congress enacted ERISA to preserve pension plan assets and to guarantee income to *all* participants *at retirement*, not specific benefits for individual claimants. A fiduciary is given broad discretion to accomplish this purpose, and his decisions will not be disturbed unless they are arbitrary and capricious. This Court approved setoffs in *Alessi*; while they may diminish a particular individual's pension benefit, they are consistent with the congressional purpose of preserving the fund as a whole for all participants.

III. Petitioner's theory has no basis in logic. *Every* determination adverse to a participant lessens the total disbursements of the plan, and decreases the necessity for employer contributions; according to petitioner's theory, that results in a "benefit" to the employer. But the logical conclusion of that theory is that a fiduciary would *never* be able to decide against a plan participant, for to do so would always violate ERISA.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE PETITION FAILS TO SATISFY THE CRITERIA FOR REVIEW ON A WRIT OF CERTIORARI.

The only issue presented is whether the setoff in question violated ERISA since, even under petitioner's theory, there is no claim that the transfer without the setoff "inured to the benefit" of Xerox. That issue is not appropriate for consideration on writ of certiorari for the following reasons:

A. The validity of setoffs under ERISA has already been settled by this Court in the *Alessi* case. *See infra* at 12-13. The Sixth Circuit merely applied that settled principle to the particular facts presented here.

B. The decision below is not in conflict with *any* decision of this Court. Petitioner has not identified such a case, and respondents are not aware of any.

C. There is no conflict among the circuits on this issue. Those circuits which have considered setoffs have unanimously approved them. *See, e.g., Kapuscinski v. Plan Administrator*, 658 F.2d 427 (6th Cir. 1981); *Quinn v. Burlington Northern Inc. Pension Plan*, 664 F.2d 675 (8th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); *Employee Benefits Committee of the Retirement System of Hawaiian Telephone Co. v. Pascoe*, 679 F.2d 1319 (9th Cir. 1982); *Server v. Interpace Corp.*, 657 F.2d 1115 (9th Cir. 1981); and *Myron v. Trust Co. Bank Long Term Disability Benefit Plan*, 522 F. Supp. 511 (N.D. Ga. 1981), *aff'd mem.*, 691 F.2d 510 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 3086 (1983). There is no case, in any circuit, inconsistent with this one.

D. The transfers and setoff at issue are so peculiar and extraordinary that it is highly unlikely that a decision based on them will ever have precedential value. The unusual nature of the facts here makes it unlikely that they will be duplicated. The Court should decline to consider a case on certiorari

where, as here, it turns on the application of a settled principle of law to unique pension plans.

E. Whether Xerox could transfer and then set off these funds is not an important issue that requires review by the Court to guarantee the effective administration of justice in the United States. Whatever its importance to the parties, this claim simply does not raise a substantial federal question which merits the attention of this Court.

II. THE DECISION BELOW IS CORRECT.

A. The Legislative Purpose of ERISA Is to Preserve Pension Plan Assets to Guarantee Income to *All* Participants *at Retirement*, not Specific Benefits for Individual Participants.

Petitioner's assertion that ERISA somehow guarantees his individual claim and that an employer or other fiduciary cannot make a determination adverse to an individual claimant if it results in some remote "benefit" to the employer has no basis in the legislative history of ERISA, and "[t]he ultimate question is one of congressional intent . . . ." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979).

ERISA is the result of an exhaustive consideration by Congress of the problems that had arisen for millions of Americans who had discovered upon reaching retirement age that they would not receive a pension, either because they were not vested in a pension plan, or because the assets of the plan had been dissipated; "despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans . . . ." 29 U.S.C. § 1001(a)(1976). Congress wanted to make sure that those who do participate in such plans actually receive benefits and do not lose them as a result of unduly restrictive forfeiture provisions or failure of the pension plan to accumulate and retain sufficient funds to meet its obligations. H.R. Rep. No. 807, 93d Cong., 2d Sess. 8, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4670,

4676-77. Congress ensured the integrity of accrued benefits through vesting requirements and by proscribing forfeitures. As the court below noted, to guarantee that an employee receives his pension *at retirement*, ERISA establishes minimum rules for employee participation, funding standards to increase the solvency of the plans, and an insurance program to be sure assets are available in case the plan terminates with insufficient funds. *See* Petition at A-3-4; 732 F.2d 548 at 550.[5]

Congress realized that it was dealing with plans which are voluntarily created by employers, so it gave them maximum freedom, as overly stringent regulation would deter the employers from instituting any plans at all. *See* 120 Cong. Rec. 4308 (1974).

> The purpose of this pension legislation is not to establish an ideal pension plan, but rather, to set up certain minimum standards to assure that all workers receive the pension benefits that they have earned. Congress will be careful to avoid making these standards so tough that they will actually discourage the creation of new pension plans and thereby deny additional workers the opportunity to participate in private retirement plans.

119 Cong. Rec. 30,041 (1973) (remarks of Sen. Bentsen). Thus "Congress left employers with wide discretion regarding what benefits would be provided by their plans." *Petrella v. NL Industries, Inc.*, 529 F. Supp. at 1365. Contrary to petitioner's assertion (Petition at 17), Xerox was free to exercise that broad discretion when it amended the Xerox Plan in 1975 and when it created RIGP in 1977, for "despite the extensive statutory scheme governing pension plans, Congress left many matters to the discretion of the parties." *Van Orman v. American Insurance Co.*, 680 F.2d 301, 312 (3d Cir. 1982).

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[5] Congress did not require that interim or ancillary benefits be guaranteed. H.R. Rep. No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4670, 4726; *Petrella v. NL Industries, Inc.*, 529 F. Supp. 1357, 1366 (D.N.J. 1982). Therefore, even if the issue of an alleged loss of investment flexibility was before the Court, *see supra* note 4, that flexibility is not guaranteed by ERISA.

B. The Fiduciary's Duty Is to Preserve the Assets of the Plan to Insure Adequate Funding.

> Congressional purpose and [the corresponding duty of fiduciaries is] to protect the total plan funds for retirement, death or disability compensation.

Fine v. Semet, 514 F. Supp. 34, 43 (S.D. Fla. 1981), *aff'd*, 699 F.2d 1091 (11th Cir. 1983).

ERISA makes clear that the fiduciary's duty is to act as a prudent trustee to preserve the total assets of the fund, not petitioner's individual share. It provides that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1) (Supp. IV 1980). To accomplish this, the fiduciary must discharge his duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use . . . ." 29 U.S.C. § 1104(a)(1)(B)(1976). Congress was very specific as to the type of behavior of a fiduciary it was proscribing, 29 U.S.C. § 1106 (1976), and a trustee violates the standard of care only if he acts "in bad faith, or upon lack of a factual foundation, or when unsupported by substantial evidence." *Tomlin v. Board of Trustees of the Construction Laborers Pension Trust*, 586 F.2d 148, 150 (9th Cir. 1978). The ERISA standard is the same as that found in the Labor-Management Relations Act, *Gordon v. ILWU-PMA Benefit Funds*, 616 F.2d 433, 438 (9th Cir. 1980), and requires the fiduciary to act for the benefit of *all* participants, not just some.

> The trustees of a pension plan have a fiduciary duty to preserve the financial security of a pension fund and to apply the assets of the fund for the benefit of the employees to the greatest extent possible. We recognize that these respective obligations are often conflicting. Any action taken by the trustees is bound to be categorized as

> arbitrary by those adversely affected by it. Partly because of these conflicting obligations, trustees are given broad discretion to act.

Adams v. Trustees of the New Jersey Brewery Employees' Pension Trust Fund, 670 F.2d 387, 397-98 (3d Cir. 1982) (footnotes omitted).

Xerox therefore has broad discretion, and the decision to apply the setoff in question "must prevail unless it was arbitrary and capricious, in light of the legislative purposes behind ERISA and the legitimate purposes of the Plan," *Oates v. Teamster Affiliates Pension Plan*, 482 F. Supp. 481, 484 (D.D.C. 1979) (footnotes omitted), which were to preserve the assets of the entire plan—and not to enhance the claim of one individual over the other participants. *Palino v. Casey*, 664 F.2d 854, 858 (1st Cir. 1981).

C. ERISA Permits Setoffs.

Setoffs such as those provided for in RIGP are routine, and clearly contemplated by ERISA. This Court considered the legislative history of ERISA in approving setoffs in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), and found that the vesting and nonforfeitability provisions of ERISA do not bar setoffs. As the Sixth Circuit said in *Kapuscinski v. Plan Administrator*, 658 F.2d 427, 429 (6th Cir. 1981), (affirming another case where pension plan trustees set off other sources of income in determining benefits):

> In *Alessi*, the Court noted that the nonforfeitability provision of ERISA, Section 1053(a), "assures that an employee's claim to the protected benefit is legally enforceable, but it does not guarantee a particular amount or a method of calculating the benefit." *Id.* at 512, 101 S.Ct. at 1900. The Court then discussed "integration," which it described as "a calculation practice under which benefit levels are determined by combining pension funds with other income streams available to the retired employees." *Id.* Elucidating, the Court stated:

Through integration, each income stream contributes for calculation purposes to the total benefit pool to be distributed to all the retired employees, even if the nonpension funds are available only to a subgroup of the employees. The pension funds are thus integrated with the funds from other income maintenance programs, such as Social Security, and the pension benefit level is determined on the basis of the entire pool of funds. Under this practice, an individual employee's eligibility for Social Security would advantage all participants in his private pension plan, for the addition of his anticipated Social Security payments to the total benefit pool would permit a higher average pension payout for each participant. The employees as a group profit from that higher pension level, although an individual employee may reach that level by a combination of payments from the pension fund and payments from the other income maintenance source. In addition, integration allows the employer to attain the selected pension level by drawing on the other resources, which, like Social Security, also depend on employer contributions.

The circuit courts have uniformly endorsed setoffs. In addition to *Kapuscinski, see Employee Benefits Committee of the Retirement System of Hawaiian Telephone Co. v. Pascoe*, 679 F.2d 1319, 1321 (9th Cir. 1982), ("the *amount* of benefits provided under a pension plan is specifically left to the determination of the parties . . . ." (emphasis in original)); *Server v. Interpace Corp.*, 657 F.2d 1115 (9th Cir. 1981); *Quinn v. Burlington Northern Inc. Pension Plan*, 664 F.2d 675 (8th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); and *Myron v. Trust Co. Bank Long Term Disability Benefit Plan*, 522 F. Supp. 511 (N.D. Ga. 1981), *aff'd mem.*, 691 F.2d 510 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 3086 (1983).

III. PLAINTIFF'S THEORY VIOLATES THE PUBLIC POLICY OF ERISA.

A claim that there cannot be an offset of retirement funds by an employer-trustee, Petition at 18-19, was rejected in *Flinchbaugh v. Chicago Pneumatic Tool Co.*, 531 F. Supp. 110 (W.D. Pa. 1982), because ERISA specifically contemplates management as trustees, and their actions in using setoffs to preserve the funds in a plan are reasonable and not a conflict of interest. *See also Fine v. Semet*, 514 F. Supp. 34, 43 (S.D. Fla. 1981), *aff'd*, 699 F.2d 1091 (11th Cir. 1983), which rejected a claim such as Holliday's because its acceptance would logically prohibit all major participants from serving as trustees, since any action to increase the profitability of plan assets could be construed as self-dealing.

That just makes sense, for there is a basic logical flaw in petitioner's case—one that would destroy the employer-contributed pension plans that ERISA seeks to preserve if it became the law. *Every* setoff (indeed, every determination a trustee makes which denies a benefit to a participant) has the effect of preserving the fund's assets, and diminishes, to some extent, the amount the employer contributes. But if Holliday's theory were carried to its logical conclusion, a trustee could *never* make a determination adverse to a participant; if he did, that determination would "benefit" the employer and therefore every time he did, he would violate ERISA.

That's absurd.

CONCLUSION

This case involves the application of a settled principle of law to unique facts, important only to the parties, and does not raise an issue of significance for the national administration of justice. Further, the decision below is correct. Accordingly, the petition should be denied and respondents awarded costs and such other and further relief as is proper.

Respectfully submitted,

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September 21, 1984